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No. 07-1436

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In The

# Supreme Court of the United States

JAMES A. TILTON, Secretary, California Department of Corrections and Rehabilitation,

*Petitioner,*

v.

JEROME ALVIN ANDERSON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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The Court has requested a Brief in Opposition to the Petition for Writ of Certiorari filed by the State of California on May 15, 2008. Respondent asks that certiorari review be denied.

## INTRODUCTION

There are no compelling reasons to grant certiorari review in this case. The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923). The Petition offered by the State of California fails to identify a conflict between circuit decisions or state courts, and fails to identify an important question of federal law that has not been decided by this Court. See Rule 10, Supreme Court Rules.

Petitioner's first argument claims that the circuit decision failed to provide sufficient deference to the state court decision. Here, the Petition presents no compelling or controversial issues. The standard for federal court review under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) has been before this Court numerous times, several times in the last term. Petitioner proposes no new insight or reformulation of this Court's established procedures for AEDPA review.

The twelve-member majority of the *en banc* panel here gave the state court judgment more than sufficient

deference. The conclusion that the state court contravened this Court's clearly established precedent, and that its opinion resulted in an unreasonable determination of the facts, see 28 U.S.C. § 2254(d)(1), is not remarkable. Petitioner merely wants to re-argue the case. There is no issue here which merits review by this Court. See discussion below.

As to Petitioner's second argument, the Petition suffers from the opposite weakness. Based on an argument advanced for the first time in a single dissenting opinion to the *en banc* decision, Petitioner proposes that the effect of a *Miranda*[1] violation be excused if the violation ultimately forces a waiver and confession. According to this novel proposal, police would be permitted to continue interrogation indefinitely after the assertion of the defendant's right to remain silent (here, roughly an hour) in hopes that the defendant will cave in to pressure and waive his right to remain silent. So long as there is some break in the questioning (here, less than one second[2]), the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] See the opinion of the state court of appeal, App. D at 21, n. 4: "The officer running the tape recorder testified the recorder was only off for a second, and the only person speaking during the pause was defendant." See testimony of Detective O'Connor, in a pretrial hearing in state superior court, 1 R.T. 227-228: "I was under the impression the interview was stopped right then. So I shut of the tape . . . [H]e kept talking. So, you're talking less than a second."

According to the dissent of Judge Bea, "It is unclear how long the interrogation was stopped after Anderson requested an attorney, and before Anderson asked to speak with Lt. Bishop.

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resulting rights waiver would cure all the illegal conduct that had gone before.

This novelty would create a terrible rule. It would eliminate the hard-won certainty which has accrued to the *Miranda* rule over decades, and it would create uncertainty over whether *Miranda* is meant to be an enforceable rule at all. It would encourage bullying tactics by the police. Its only certain effect would be to encourage lawless experimentation by the very forces that are sworn to uphold the law. The Court should not dignify this proposal by a grant of certiorari review. See discussion below.

## ARGUMENT

### I. NO SIGNIFICANT CONSTITUTIONAL ISSUE IS RAISED CONCERNING WHETHER RESPONDENT INVOKED HIS RIGHT TO SILENCE.

The *en banc* Circuit Court of Appeals, by an overwhelming majority, found that the state court decisions permitting the use of Respondent's confession were unreasonable, and violated this Court's clearly established precedents.

The Circuit Court analysis closely tracks this Court's precedents. This Court has taken advantage

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The record implies it did not appear to be a long period of time." App. A 38. At best, this is an understatement.

of multiple opportunities to apply the language of 28 U.S.C. § 2254(d), including the proviso that federal relief may only be granted where a prior state court adjudication resulted in a decision that was "contrary to," or involved an "unreasonable application of," clearly established federal law as determined by this Court, or which resulted in a decision that was based on an "unreasonable determination" of the facts in light of the evidence. See *Williams v. Taylor,* 529 U.S. 362, 411 (2003), *Lockyer v. Andrade,* 538 U.S. 63, 76 (2003), *Yarborough v. Alvarado,* 541 U.S. 652 (2004), *Abdul-Kabir v. Quaterman,* 127 S.Ct. 1654, 1671 (2007), and *Panetti v. Quaterman,* 127 S.Ct. 2842, 2858-2859 (2007).

As stated by the Court of Appeals, "Nothing was ambiguous about the statement 'I plead the Fifth.'" App. A at 16.[3] The state court decision was unreasonable, because "the officer's comment showed that the interrogating officers did not believe that Anderson's statement was ambiguous." App. A at 20.

Petitioner reminds the Court that the context – the circumstances leading up to the invocation – must be considered in determining what the defendant meant by his apparent invocation. Pet. at 15. But it is precisely the context of the interrogation which makes the invocation so unequivocal, and the continuing interrogation such a blatant disregard of this

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[3] "App." refers to page citations to the Appendix to the Petition for Writ of Certiorari.

Court's *Miranda* rule. Respondent's affirmation "I plead the Fifth" was only the culmination of a series of efforts to terminate the interrogation.[4]

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[4] The Circuit Court considered the complete transcript of the entire taped interrogation as part of the record in this appeal. App. A at 9, n. 2. The transcript is 167 pages in length. The total interview was about three hours. Although there are some interruptions, the page numbers provide a rough idea of where the words appear in relation to the total interrogation. "TO" refers to sheriff's detective Tom O'Connor. "JA" refers to Respondent Jerome Anderson.

At page 61: 11-14, the defendant asks to be "taken upstairs," i.e. out of the interrogation room and into the general jail population on his parole violation. "TO: You know, exactly what I'm talking about." [¶] "JA: No, I don't, if you're insinuating – No way, no way. Can I – Can I go ahead go upstairs, or whatever?" [¶] "TO: We want to get this thing straightened out . . . " [¶] "JA: So, do I."

Again, at page 75: 4: "JA: Can I go ahead an' go up there, an' go lay down or whatever." [¶] "TO: No, just, . . . I wonder . . . You smoke Camels, right?"

At page 78: 12-18, as the interrogators accused Respondent directly of the murder: "TO: You act like you're cryin' like a baby, an' you can't cry for someone that was a no good . . . an' you killed him for a good reason." [¶] "JA: No, way! No, way. I – you know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong."

[Up to this point the interrogators had not mentioned drug usage. Since Respondent was trying to stop an interrogation which had only one subject and one focus, the Court of Appeals was entirely correct to conclude that there was no ambiguity in the invocation, App. A at 17, 20. See also Judge Bea's opinion, App. A at 30-31, which also concluded that the invocation was not ambiguous. The state is entirely wrong to suggest that there is a perceived ambiguity. See Pet. at 15-16.]

(Continued on following page)

The state court's reliance on the defendant's continued interplay with the interrogators as a reason to whitewash the officers' disregard of the *Miranda* invocation was "contrary to" United States Supreme Court precedent, clearly expressed in *Miranda v. Arizona, supra,* and in *Michigan v. Mosley,* 423 U.S. 16 (1975). App. A at 16, n. 3. Here too, the Circuit Court's analysis was in congruity with this Court's established precedent. See *Early v. Packer,* 537 U.S. 3, 11 (2002) and *Woodford v. Viscotti,* 537 U.S. 19, 27 (2002).

Petitioner offers no reason to reconsider the established procedures of this Court in dealing with federal court review of AEDPA claims. The conclusion of the Circuit Court was unremarkable and does not merit further review.

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At page 79: 7-12 the interrogation focused on the methamphetamine pipe that was found at the crime scene. "TO: Well, what kind of pipes?" [¶] "Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . . " [¶] "TO: Well, you already are. I wanna know what kinda pipes you have?" [¶] "JA: I plead the fifth." [¶] "TO: Plead the fifth. What's that?"

The invocation which was briefly honored by the detectives appears at page 119, followed by another waiver and the confession.

## II. THE STATE'S PROPOSAL TO EXCUSE UNLAWFUL POLICE INTERROGATION, ON THE BASIS THAT IT LATER RESULTED IN A WAIVER AND A CONFESSION, WOULD TURN THE *MIRANDA* RULE ON ITS HEAD AND UNDERMINE RESPECT FOR THE LAW.

Purportedly, the state merely proposes a rule that a break in interrogation (even one of microscopic proportions) wipes the slate clean of prior misconduct and permits the use of a confession obtained after the break in interrogation. In reality, the present case involves a blatant violation of the defendant's expressed wish to remain silent ("I plead the Fifth."), uttered almost an hour before any break in interrogation. Therefore the proposed rule, though focusing on the break in interrogation, in actuality is nothing but a stratagem for obscuring the earlier police misconduct. The proposed rule would not only undermine legal protections against the use of involuntary confessions, it would foster disrespect for the law by endorsing a stratagem to avoid the legitimate assertion of a constitutional right.

Preliminarily, Respondent notes that Petitioner's argument is taken wholly from the opinion of Judge Bea, dissenting from the *en banc* majority. App. A at 30-39. The argument was first proposed by Judge Bea; one may search the prior state and federal opinions and the prior briefing in vain for any reference to it. Had this been an issue in the state superior court, the defendant could have confronted it; he

would certainly have asked pointed questions to the interrogating officers, including whether the police tactic was a deliberate effort to subvert *Miranda*. But the state never proposed this argument at any level prior to this very late stage of the proceedings.

In applying the AEDPA this Court has cautioned that prior state court opinions must be reviewed carefully, to determine the reasoning that actually governed them. See *Holland v. Jackson*, 542 U.S. 649, 654-655 (2004) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) (*per curiam*). Since the later-interruption argument was not relied upon by the state court, and was not advanced by the state in support of the state court judgment until it joined Judge Bea's proposal, it should not be addressed by this Court at this late stage.

This Court has not forbidden all police interrogations, forever and on any subject, following a valid *Miranda* assertion. But the interrogation must cease. Thereafter, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Michigan v. Mosley*, *supra*, 423 U.S. at 104. Here, the right to remain silent was not honored.

Respondent was subjected to uninterrupted interrogation for almost an hour after his invocation of the right to remain silent. The proscription on resumed interrogation is not indefinite. *Michigan v. Mosley*, *supra*, at 102-103. But the invocation must be

honored by an immediate interruption in the interrogation. Here the interrogation was not interrupted at all, and that cannot be permitted.

When an accused has invoked his right to have counsel present during custodial interrogation, "a valid waiver of that right cannot be established by showing only that *he responded to further police-initiated custodial interrogation* even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981) (emphasis added). An accused who has expressed his wish to remain silent is not subject to further interrogation, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Ibid.* Mr. Anderson's invocation here was followed directly by an hour of *police*-initiated custodial interrogation, in total disregard for the invocation and for this Court's clearly-stated law on such interrogations. *Michigan v. Mosley, supra.*

What occurred an hour later – an interruption (brief or long), another advisement, a waiver, a confession, or none of these – is beside the point. The continued interrogation was illegal, and the consequence is exclusion of the result of the interrogation, whatever it may have been. The necessary exclusion of evidence here is not a new or unanticipated application of *Miranda*, but an unremarkable application of well-settled rules.

The *Edwards* rule provides a "bright line" rule that can be applied by officers in the real world of

investigation and interrogation without unduly hampering the gathering of information. *Davis v. United States,* 512 U.S. 452, 460 (1992). The officers here, or in any similar situation, are not "left to wonder" what to do under current law. Pet. at 14. That necessary goal – predictability and ready application in the real world – would be defeated under the changes proposed by Petitioner.

Under Petitioner's proposed rule, an interrogator would be tempted – nay, invited – to continue questioning even after a valid invocation.[5] Under Petitioner's blueprint the officer would only interrupt the interrogation, briefly and long after the invocation, at the precise point where the suspect seems most vulnerable and ready to cave in to the uninterrupted illegal questioning. Predictably, the suspect, now desperate, may himself initiate a further conversation. From the interrogator's standpoint, it would be worth taking the chance, in the expectation that the officer's earlier misconduct would be cleansed in retrospect by the very extension of the illegal interrogation. Just as for Hera bathing in the spring of Kanathos,[6] the earlier violation would be forgotten.

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[5] This new rule would be a variation on the theme of "questioning outside *Miranda*," noted and condemned by this Court in *Missouri v. Seibert*, 542 U.S. 600, 610, n. 2 (2004).

[6] Cf. Article "Kanathos," in *Wikipedia*, http://www.wikipedia.org, and sources there cited.

This Court has already rejected such a blueprint for chaos. "'No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.' [citation]." *Smith v. Illinois,* 469 U.S. 91, 99 (1984). Petitioner offers no good reason, or any reason at all, to overturn so much of this Court's authority. Petitioner certainly offers no reason to create, in place of this Court's authority, such lawlessness and uncertainty.

## CONCLUSION

For the reasons stated, the Petition fails to state sufficient grounds for review by this Court, and should be denied.

Dated: August 15, 2008

Respectfully submitted,

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# REPLY BRIEF

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# In the Supreme Court of the United States

JAMES A. TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner,*

v.

JEROME ALVIN ANDERSON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## CERTIORARI IS WARRANTED TO VINDICATE THE HABEAS CORPUS REFORMS CONGRESS ENACTED IN AEDPA AND TO PROVIDE PRACTICAL GUIDANCE TO LAW ENFORCEMENT

Anderson first argues that review is unwarranted because, he says, this case presents nothing new of constitutional significance (Opp. pp. 1, 3-7). But this Court has recognized in past grants of certiorari that questions of the proper application of AEDPA are important. And this case involves not only that but also a question of this Court's *Miranda* jurisprudence.

1. Here, two state courts expressly found Anderson's "I plead the fifth" statement ambiguous in context and the officers' attempt to clarify proper. The federal district court, applying the AEDPA deference standard, found these state court determinations reasonable. Two judges on the initial Ninth Circuit panel determined that the state courts' findings on ambiguity and clarification were reasonable determinations of fact and that the state courts had not unreasonably applied clearly established federal law. On the *en banc* panel, two judges (Judges Tallman and Callahan) agreed, and two other judges (Judges Silverman and Rawlinson) agreed on the ambiguity question. This case is not unremarkable: it represents a significant violation of AEDPA.

The *Miranda* point, moreover, is of immense concern to law enforcement. Although this Court in *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966), recognized that police must stop questioning if a suspect indicates "in

any manner" that he wants to cut off questioning, this Court has not delineated what is further required. Moreover, there is no clearly established precedent from this Court addressing what officers may do when faced with an arguably ambiguous invocation of the right to silence. In *Davis v. United States*, 512 U.S. 452, 461-62 (1994), concerning an equivocal invocation of the right to *counsel*, this Court stated that clarifying questions can be good police work. In holding that Anderson's statement was ambiguous and that the officers' follow-up question could reasonably be interpreted as a legitimate clarifying question, the state courts reasonably applied *Davis*. This Court has not held its *Davis* principles inapplicable to right-to-silence cases, and it was not "unreasonable" or "contrary to" clearly established law for the state courts to do so. See *Carey v. Musladin*, 549 U.S. 70, 75 (2006).

Anderson acknowledges that context is critical. However, he claims that the context here shows not only that his "I plead the fifth" statement was unequivocal, but that it was "only the culmination of a series of efforts to terminate the interrogation." (Opp. p. 5.) Here, he follows the lead of the Ninth Circuit *en banc* majority ("Anderson had already *twice* attempted to stop the police questioning . . . ."). App. A, p. 17. But he has never previously argued that his statements about "going upstairs" to the general jail population constituted invocations or attempts to end the interrogation (though an *amicus curiae* for Anderson did so).

While the larger context of the interrogation concerned the murder, the immediate context of Anderson's disputed statement was his use of drug pipes to smoke methamphetamine. Anderson misreads the record at this point, claiming that "the interrogation

focused on the methamphetamine pipe that was found at the crime scene." (Opp. p. 6, n. 4.) Actually, the topic had shifted from Anderson's drug use the day of the murder to his drug use in general; when Anderson said "I plead the fifth," the questioning was *not* focused on the pipe found at the crime scene. Consequently, Anderson was not invoking his right to silence if he was just refusing to discuss the particulars of his drug use. See *People v. Rundle*, 43 Cal.4th 76, 115 (2008); *People v. Stitely*, 35 Cal.4th 514, 535 (2005). Only by ignoring this topic-shifting context of the questioning could the Ninth Circuit override the state courts and hold that Anderson's statement was an unequivocal invocation of his right to remain silent.

2. Regardless whether the police violated Anderson's *Miranda* rights by continuing their interrogation after he said "I plead the fifth," the Ninth Circuit wrongly granted relief on the assumption that the earlier error rendered the later confession inadmissible. Anderson points out that this argument was first raised by Judge Bea in the Ninth Circuit. (Opp. p. 7.) That is true only because no court until the Ninth Circuit *en banc* majority opinion had found Anderson's invocation to be unambiguous or the officers' attempt to clarify disingenuous. Hence, there had never been any need to address this scenario before. Having been raised by the Ninth Circuit, this issue is properly before this Court. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n. 8 (1991); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Anderson complains that, had this issue been raised in the state superior court, he "would certainly have asked pointed questions to the interrogating officers," including whether they were trying to "subvert *Miranda*." (Opp. pp. 7-8.) But Anderson did so: Detective MacDonnald

testified that he had been trained to cease questioning when a suspect invokes and that he does not question outside *Miranda* or allow others to do so. The concerns expressed by this Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), are not present here. (Opp. p. 10, n. 5.) The State's argument could not possibly encourage any police practice of subverting *Miranda*.

Anderson asserts that "[w]hat occurred an hour later . . . is beside the point." (Opp. p. 9.) His opposition brief conspicuously sidesteps any discussion of *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), which held that a failure-to-warn *Miranda* violation does *not* taint a subsequent uncoerced admission made after proper *Miranda* waivers. A failure to give the *Miranda* advisements when clearly required is more egregious than a failure to correctly discern whether a suspect wishes to completely stop an interrogation. As in *Elstad*, the admissibility of Anderson's confession, made after his honored invocation and immediate waiver, should turn solely on whether it was knowingly and voluntarily made. *Oregon v. Elstad*, 470 U.S. at 309.

Anderson posits that the State's "proposed rule" would invite continued questioning even after a valid invocation. (Opp. p. 10.) Not so. The State is concerned with interrogations where an officer misinterprets an ambiguous invocation and is later faced with a suspect who begs to talk after any clearly-invoked rights of his were indeed honored. This is not a case where police extended an illegal interrogation in hopes that a suspect will later change his mind and want to talk. Nor is it whitewashing an earlier violation. Certiorari is warranted so that this Court can give some needed, real-world guidance to officers interrogating suspects who, like Anderson, ambiguously invoke their right to silence, but—after a later clear

invocation of the right is honored—then insist on talking.

For the foregoing reasons and for the reasons set forth in the petition for writ of certiorari, the petition for writ of certiorari should be granted.

Dated: September 4, 2008

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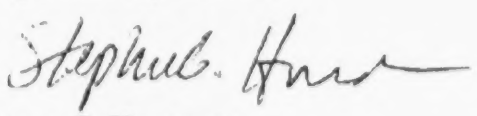

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